No. 89-1225

In The

Supreme Court of the United States

October Term, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment oust the courts of a state (and the federal court sitting therein) of jurisdiction over a claim by that state's resident against a nonresident, for an alleged fraudulent misrepresentation in a contract for the sale of land in a third state, which was negotiated across state lines and signed by each party in its own state, where the defendant's only contacts with the forum were the interstate contract negotiations and the damage foreseeably caused to the plaintiff in the forum, where the court of appeals held that the district court had no personal jurisdiction to adjudicate the plaintiff's contract claims based upon the identical alleged misrepresentation, and where the plaintiff/petitioner has raised no challenge to that ruling?

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The respondent, Deer Creek Enterprises, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. That decision is reported at 885 F.2d 1293, and is reprinted at pp. 1-30 of the petitioner's appendix ("App.").

STATEMENT OF THE CASE

Plaintiff/petitioner LAK, Inc. (a Michigan corporation), as the assignee of the executory contract right of the

Beznos Realty Investment Company (a Michigan co-partnership) to purchase a substantially-undeveloped tract of land in Florida from defendant/respondent Deer Creek Enterprises (an Indiana general partnership), sued Deer Creek in Michigan for specific performance or in the alternative for damages, asserting breach of contract and fraud. *See* App. Rec. ("Appellate Record") 1. Both claims were based upon the alleged breach of the same contract warranty – that "the Property is currently zoned to permit the construction of 532 units, and 532 units shall be available to the property in accordance with an appropriate site plan, as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property" (*see* Pet. at 4-5 & n.4).[1]

Upon denial of Deer Creek's motion to dismiss for lack of personal jurisdiction (App. Rec. 14), the legal part of the case was tried before a jury in September of 1986, resulting in special verdicts finding that Deer Creek had misrepresented the number of dwelling units which might be constructed on the property, and had breached the contract warranty on that subject, but that Deer Creek was not liable on either count, because neither event was

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[1] As the court of appeals noted (App. 9), and as both parties acknowledged at trial and on appeal, the property at all times was zoned to permit more than 540 units (8 existing units plus the proposed 532-unit project). The controversy centered on the question of whether the contract obliged Deer Creek, the seller, actually to secure local approval of a site plan for 532 additional units, or whether it merely constituted Deer Creek's warranty (the clause in question is found under the heading "Seller Representations and Warranties," *see* Pet. at 4) that 532 units "shall be available . . . as long as ***Purchaser*** complies with all appropriate laws and regulations" (our emphasis).

the proximate cause of any damage to the purchaser (App. Rec. 91).[2] Notwithstanding the jury's finding of no liability, it nevertheless executed an advisory verdict recommending specific performance of the contract (App. Rec. 91). Inexplicably, the district court accepted that recommendation (App. Rec. 92, 93).

Drawing no distinctions between the contract claim and the fraud claim, the court of appeals held that the

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[2] Under Florida law, which both sides admitted governed both the contract and fraud claims, actual damage is an element of ***liability*** for breach of contract and fraud. *See Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983) (Florida law) (fraud); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1490 (11th Cir. 1983) (Florida law) (contract), *cert. denied*, 465 U.S. 1102 (1984); *Johnson v. Davis*, 480 So.2d 625, 627 (Fla. 1985) (fraud); *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) (fraud); *Stokes v. Victory Land Co.*, 99 Fla. 795, 128 So. 408, 410 (1930) (fraud); *Charter Air Center, Inc. v. Miller*, 348 So.2d 614, 616 (Fla. 2d DCA) (fraud), *cert. denied*, 354 So.2d 983 (Fla. 1987); *Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977) (per curiam) (contract); *McIntyre v. McCloud*, 334 So.2d 171, 172 (Fla. 3d DCA 1976) (per curiam) (contract); *Scott-Steven Development Corp. v. Gables By the Sea, Inc.*, 166 So.2d 763, 764 (Fla. 3d DCA 1964) (contract), *cert. denied*, 174 So.2d 32 (Fla. 1965). Both the district court's instructions and the verdict form reflect this requirement of damage, and the jury's verdict connotes its acceptance of the uncontradicted evidence that because the property already was zoned to accommodate the project, *see supra* note 1, the ministerial formalities of securing local approval presented no significant barrier. Indeed, as the court of appeals noted (App. 9-10), after suffering the district court's ruling, "Deer Creek promptly sought such approval, and later submitted evidence to the district court that on January 27, 1987, the Deerfield Beach City Commission decided to support construction of all of the additional units requested."

district court in Michigan had no specific jurisdiction over Indiana partnership Deer Creek, which had not purposefully availed itself of the privilege of transacting business in Michigan, and also that LAK's claims had no "connexity" to Deer Creek's tenuous contacts with Michigan. The relevant facts are stated in the court of appeals' opinion (App. 3-10). Deer Creek is an Indiana partnership which owns a piece of land in Florida, and has never transacted any business, maintained any office, or owned any property in Michigan (App. 3). It did not advertise the parcel for sale, "either in Michigan or elsewhere," but rather "received an unsolicited inquiry" from LAK's predecessor, Beznos Realty, a Michigan limited partnership (*id.*). All of the initial meetings took place in Florida, interspersed with telephone calls between Florida and Michigan (App. 3-4). Deer Creek's Indiana counsel subsequently dispatched a draft agreement to one of Beznos Realty's principals in Phoenix, Arizona, and a second copy to California (App. 5), and there followed a series of telephone conversations between Indiana and Beznos Realty personnel not only in Michigan, but in "Canada, Mexico, Texas, New York, Arizona and California" (App. 5). The court of appeals observed, "for whatever that datum may be worth," that "the majority of the lawyers' telephone calls . . . were originated not by the defendant's lawyers . . . but by . . . the lawyer for Beznos Realty" (App. 20). The final contract was signed by Beznos Realty in Michigan, and then was sent to Deer Creek in Indiana, where it was signed and thus "became legally binding" (App. 6). It calls for the application of Florida law (*id.*).[3]

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[3] The court of appeals did not, as LAK asserts (Pet. at 12 & n.9), place disproportionate reliance upon the fact that the

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Beznos Realty provided a check for the earnest money, which was deposited in an Indiana bank, and subsequently secured a loan commitment from the Atlanta regional office of a Texas bank (App. 7). Following a dispute about which party was required to take the necessary steps in Florida to secure approval by the Florida local authorities of the number of condominium units to be built in Florida (App. 8-9), Beznos Realty assigned its interest in the purchase agreement to LAK, Inc., and two weeks ***before*** the deadline for closing, LAK filed the instant lawsuit in Michigan, charging anticipatory breach of contract and fraud (App. 10-11).

ARGUMENT

1. LAK is Correct in Conceding that the Court of Appeals Properly Found No Personal Jurisdiction Over Its Contract Claim Against Deer Creek.

Although LAK has discussed at length the Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (hereinafter *"Burger King"*), which defines the parameters of personal jurisdiction in the context of a contract dispute arising out of a commercial relationship (*see* Pet. 10-13), LAK's statement of the question presented references only its tort claim for fraud – not its contract claim – and under Rule 21.1(a) of the Rules of this Court,

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contract was "made" in Indiana. That was only "a factor" – but not "determinative" (App. 19). Far more important, but also not dispositive, was the contract's prescription of Florida law (App. 6).

that is the only issue properly presented.[4] LAK's concession was appropriate, because there is no question that in the context of this commercial contractual dispute, Deer Creek did not "engage[] in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. 320, 329 (1980).

As the court of appeals recognized (App. 20), that criterion focuses upon the ***defendant***'s purposeful behavior vis-a-vis the forum state – not the plaintiff's[5] – and thus the fact that Beznos Realty drew its earnest-money deposit from a Michigan bank (*see* Pet. at 5) or itself "executed the agreement . . . in Michigan" (Pet. at 12 n.9) are constitutionally irrelevant. Only "the defendant *himself* [can] create a 'substantial connection' with the forum state," *Burger King*, 471 U.S. at 475 (emphasis in original), and the Court has held that the mere existence of an interstate contract is insufficient to evidence the defendant's purposeful availment of the benefits and protection of the forum state's laws: "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King*, 471 U.S. at 478

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[4] *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954).

[5] "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirements of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *quoted in Burger King*, 471 U.S. at 474-75, *and Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

(emphasis in original). Indeed, any other conclusion would construe the due process clause to extract a concession of jurisdiction as the inherent price of doing business across state lines – a price which LAK has candidly admitted is inherent in its position (Pet. at 13) ("Deer Creek . . . had ample opportunity to avoid [Michigan] jurisdiction by simply refusing to deal with Beznos"). This Court has expressly declared otherwise, and two key corollaries flow from that declaration, which in turn rebut the only two contacts with Michigan which LAK has attributed to Deer Creek.

First, if an interstate contract alone cannot confer jurisdiction, it necessarily follows that the interstate negotiations which attend the contract's formation are also insufficient, because they signal the "mere fortuity that the plaintiff happens to be a resident of the forum." *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 497 n.26 (5th Cir. 1974). While "the nature of [the defendant's] communications with the resident party are relevant," "because they provide a clue to the significance attached by the defendant to the activities occurring within the forum state – and thus a clue as to his expectations," *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972), the mere fact of "an exchange of communications between a resident and nonresident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum state's laws."[6]

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[6] *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985). *Accord, Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159

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Second, if the existence of an interstate contract is insufficient to confer jurisdiction, it necessarily follows that the mere foreseeability that a breach of that contract will cause injury in the forum state (which of course is

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(9th Cir. 1988); *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40, 43 (8th Cir. 1988); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 815-17 (9th Cir. 1988); *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1418, 1420 (10th Cir. 1988); *Caldwell v. Palmetto State Savings Bank of South Carolina*, 811 F.2d 916, 918 (5th Cir. 1987) (per curiam); *Nicholas v. Buchanan*, 806 F.2d 305, 307 (1st Cir. 1986), *cert. denied*, 481 U.S. 1071 (1987); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987); *Borg-Warner Acceptance Corp. v. Lovett & Thorpe, Inc.*, 786 F.2d 1055, 1062 n.4 (11th Cir. 1986); *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 932-35 (1st Cir. 1985); *Institutional Food Marketing Assoc. v. Golden Strawberries, Inc.*, 747 F.2d 448, 456 (8th Cir. 1984); *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248 (9th Cir. 1984); *Hydrokentics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 656 (8th Cir. 1982); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 312, 314 (8th Cir. 1982); *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 604 (7th Cir. 1979), *cert. denied*, 444 U.S. 907 (1980); *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 187-88 (5th Cir. 1978), *cert. denied*, 451 U.S. 910 (1981); *Aaron Ferer & Son v. Atlas Grap Iron & Metal Co.*, 558 F.2d 450, 453 (8th Cir. 1977); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 729-30 (5th Cir.), *cert. denied*, 414 U.S. 830 (1973); *Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336 (5th Cir. 1971); *Smith v. Piper Aircraft Corp.*, 425 F.2d 823, 825 (5th Cir. 1970); *Scheidt v. Young*, 389 F.2d 58, 60 (3d Cir. 1968); *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583, 587 (2d Cir. 1965).

foreseeable in every interstate contract) is likewise insufficient. And indeed, "the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction."[7] To the contrary, "purposeful availment" is shown only if "the defendant 'deliberately' has engaged in significant activities within a State . . . or has created 'continuing obligations' between himself and residents of the forum . . . ."[8] Thus in *Burger King*, it was not the fact of the interstate contract which conferred jurisdiction, but the character of that contract:

> Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. . . . Upon approval, he

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[7] *Burger King*, 471 U.S. at 474, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). *Accord, Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109 (1987); *Calder v. Jones*, 465 U.S. 783 (1984).

[8] *Burger King*, 471 U.S. at 475-76, *quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), *and Travelers Health Ass'n v. Commonwealth of Virginia*, 339 U.S. 643, 648 (1949). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297 ("isolated occurrence" insufficient); *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 320 (1945) ("isolated" and "unilateral acts" insufficient); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 934 (1st Cir. 1985) (defendant's contacts must reflect "a purposeful decision by the nonresident to 'participate' in the local economy and to avail itself of the benefits and protections of the forum").

> entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random", "fortuitous" or "attenuated." 471 U.S. at 479-80.

In contrast, as the court of appeals noted (App. 23), "[n]o such [long-term] relationship was created by the real estate purchase agreement with which we are concerned." The contract here was a "one-shot operation," *Sea-Lift, Inc. v. Refinadora Costarricense De Petroleo, S.A.*, 792 F.2d 989, 994 (11th Cir. 1986), which established "[n]o continuing business relationship," *Pickens v. Hess*, 573 F.2d 380, 386 (6th Cir. 1978), and which, "[i]n contradistinction to the contract at issue in *Burger King* . . . did not contemplate a long-term relationship with the kinds of continuing obligations and wide-reaching contacts envisioned by the *Burger King* contract." *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985). Thus, when "arrayed against the rich fabric of contacts in *Burger King*, the record in this case is clearly insufficient to support jurisdiction." *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 935 n.4 (1st Cir. 1985). From the perspective of the Indiana partnership which accepted an unsolicited offer to sell a piece of property in Florida, the buyer's residence in Michigan was entirely fortuitous. The locus of the contract was Florida, the parties' face-to-face negotiations all took place in Florida, the contract called for the application of Florida law, and the closing was to occur in

Florida. On the contract claims, at least, LAK was right to concede the correctness of the court of appeals' holding.

2. The Foregoing Conclusions Are Not Altered by the Addition of Tort Claims Based Upon the Same Activities Asserted to Constitute a Breach of Contract.

Having declined to argue the jurisdictional question in the context of the contract dispute, LAK has asserted that its claim of "fraud [which assertedly] was contained in the agreement itself" (Pet. at 12 n.9) somehow rescued an otherwise-invalid exercise of federal power, because this Court's "decisions establish that a defendant has sufficient contacts with the jurisdiction when it commits a tort knowing that it will have adverse consequences on a plaintiff resident of that jurisdiction" (Pet. at 8). That assertion is simply wrong.

As we have noted, *Burger King* held directly that the mere "foreseeability of causing *injury* in another State . . . is not a 'sufficient benchmark' for exercising personal jurisdiction." 471 U.S. at 474. At least three analogous statements are found in tort cases: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297 (in products-liability action, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); *Calder v. Jones*, 465 U.S. 783, 789 (1984) (in libel case, defendants are correct that "[t]he mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an

assertion of jurisdiction"; but "petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California"); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (in product liability case, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State").

In the light of these decisions, LAK's discussion (Pet. at 8-10) of *Calder* and of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), is seriously misplaced. In both *Keeton* and *Calder*, the offending publication was mass-distributed throughout the forum state, and thus the alleged tortious conduct itself took place within the forum. The forum state in *Keeton* had "jurisdiction over those who commit torts within its territory," 465 U.S. at 776; and in *Calder*, the defendant's "intentional, and allegedly tortious, actions were expressly aimed at" the forum, and thus the forum was "the focal point both of the story and of the harm suffered." 465 U.S. at 789. Although tort and contract claims are obviously different in some respects, the message of *Keeton* and *Calder* is that the minimum-contacts analysis is essentially the same, and that where the defendant has not insinuated himself into the life of the forum, "[t]he mere fact that [the defendant] communicated with [the plaintiff] in the state, and may have committed a tort in the exchange of correspondence, does not show that [the defendant] purposefully availed itself of the privilege of conducting business in [the forum]." *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1248 (9th Cir. 1984).

To the contrary, even in tort cases, the defendants must have "directed their actions toward the forum state," and "intended the brunt of the injury to be felt in [the forum state]." *Hugel v. McNell*, 886 F.2d 1, 5 (1st Cir. 1989).[9]

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[9] *Accord, American Express International, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1179-80 (1st Cir. 1989); *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir. 1989); *FDIC v. Lake Shore Inc.*, 886 F.2d 654, 657-60 (4th Cir. 1989); *Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159, 1163 (9th Cir. 1988); *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40, 43 (8th Cir. 1988) (per curiam); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 815-17 (9th Cir. 1988); *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46, 50 (1st Cir. 1988) (per curiam); *Saylor v. Dyniewski*, 836 F.2d 341, 343-44 (7th Cir. 1988); *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5th Cir. 1987); *Federal Deposit Ins. Corp. v. British-American Ins. Co.*, 828 F.2d 1439, 1442-43 (9th Cir. 1987); *Caldwell v. Palmetto State Savings Bank of South Carolina*, 811 F.2d 916, 917-18 (5th Cir. 1987) (per curiam).

LAK has suggested (Pet. at 7, 12 n.9) that the court of appeals itself distinguished between the tort and contract claims, in its *dictum* (App. 25-28) that LAK might have shown "connexity" by proving that Deer Creek's alleged misrepresentations had actually been made in the forum, or at least in communications to the forum. In contrast, the court of appeals noted, "[t]here was no showing that any misrepresentations were made" in such communications (App. 27). This suggestion concerned only the "connexity" requirement, and had nothing to do with the appellate court's independent conclusion that Deer Creek had not purposefully availed itself of the benefits and protections of the forum. Moreover, the court's *dictum* may not have been directed toward the constitutional question, but only toward the proper construction of Michigan's long-arm statute, or its substantive tort law. *See* App. 14 n.4 ("Michigan may have stopped short of the constitutional limit, however, as far as actions for tort are concerned"); App. 27, *quoting Serras v. First Tennessee Bank N.A.*, 875 F.2d 1212,

(Continued on following page)

For the same reasons that the court of appeals was correct to find no personal jurisdiction over the contract claim, there was no jurisdiction over the tort claim, which was based on precisely the same conduct. We understand that on a subject like this one, which is inherently fact-dependent, there are few answers "in black and white. The grays are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545 (1948). But as the court of appeals recognized, the instant case does not lie in the shadows of the present discourse on this subject, but in the clear sunlight of established principles. It presents no issue warranting this Court's attention.

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1218 (6th Cir. 1989) ("The alleged fraudulent misrepresentations practiced upon plaintiffs within Michigan, both in the phone calls and during the visit of the Bank's agent, are an *element* of the cause of action itself") (emphasis in *Serras*). Indeed, apart from constitutional requirements, a number of states appear to have limited their own substantive or jurisdictional requirements to torts actually committed within the state. *See, e.g., American Express International, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1179 (1st Cir. 1989); *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir. 1989); *Davis v. American Family Mutual Ins. Co.*, 861 F.2d 1159, 1162 (9th Cir. 1988); *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5th Cir. 1987). Therefore, this case does not present the constitutional question of whether jurisdiction can never be proper in the forum if the alleged tortious conduct took place somewhere else. The court of appeals properly found it unnecessary to reach that question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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